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7 LEWIS FAMILY ENTERPRISES, INC. and  
STEVEN ROBERT LEWIS

UNITED STATES DISTRICT COURT

## NORTHERN DISTRICT OF CALIFORNIA

## SAN JOSE DIVISION

11 FORD MOTOR CREDIT COMPANY, ) Case No.: C 07-03301 RS  
12 LLC, a Delaware Limited Liability )  
13 Company, )  
14 vs. )  
15 LEWIS FAMILY ENTERPRISES, )  
16 INC., dba BOB LEWIS LINCOLN )  
17 MERCURY, a California corporation, )  
18 and STEVEN ROBERT LEWIS, an )  
19 individual, )  
Defendants. )  
\_\_\_\_\_  
**DEFENDANTS' REPLY TO FORD MOTOR  
CREDIT COMPANY, LLC'S OPPOSITION  
TO APPLICATION OF DEFENDANTS TO  
SET ASIDE DEFAULT**  
Hearing Date: October 31, 2007  
Hearing Time: 9:30 a.m.  
Courtroom: #4, 5<sup>th</sup> Floor  
Judge: Magistrate Judge Richard Seeborg

## I. INTRODUCTION

21       Ironically, Plaintiff Ford Motor Credit Company, LLC (“Plaintiff” or “Ford Credit”)  
22 maintains that the application to set aside the default in the instant case should be denied  
23 based on the failure of Defendants Lewis Family Enterprises, Inc. (the “corporation”) and  
24 Steven Robert Lewis (“Lewis”) (collectively, “Defendants”) to respond to the complaint in a  
25 timely manner. Yet, Plaintiff filed its opposition to Defendants’ application two (2) days  
26 *following* the mandatory notice period or opposition filing deadline set forth in Civil L.R. 7-  
27 3(a).

28 Notwithstanding the foregoing, Plaintiff conveniently disregards and makes no

1 attempt to account for the representations made to Defendants by Plaintiff's then-  
 2 employee and agent, Phil Ward, a Territory Sales Manager for Ford Credit, that Plaintiff  
 3 would not be enforcing its legal rights for the duration of the negotiations between  
 4 Defendants and Ford Motor Company, the parent company of Plaintiff, for the sale of the  
 5 Ford Lincoln Mercury dealership operated by Defendants. Significantly, the success of  
 6 the buy-sell negotiations would have resulted in the final payoff or full settlement of the  
 7 debt owed by Defendants to Plaintiff. See the Declaration of Steven Robert Lewis (the  
 8 "Lewis Declaration") at ¶¶ 5, 9, 11, and 14.

9       Although Plaintiff's counsel served Defendants with the complaint and the request for  
 10 writ of possession, Mr. Ward was concurrently representing to Defendants that the legal  
 11 proceedings were a mere formality or preliminary in nature as a means of securing the  
 12 repayment of the outstanding debt owed in the event of a breakdown in negotiations  
 13 between Defendants and Ford Motor Company. See Lewis Declaration at ¶ 9. Based on  
 14 the ongoing buy-sell negotiations and the representations of Mr. Ward (i.e., that Plaintiff  
 15 would agree to stand-down, or take no further legal action during the pendency of the buy-  
 16 sell negotiations), Defendants took no action in response to the complaint or Plaintiff's ex  
 17 parte application for a writ of possession. Rather, Defendants were of the understanding  
 18 that the instant suit would be dismissed by Plaintiff upon the successful conclusion of the  
 19 buy-sell negotiations between Defendants and the parent company of Plaintiff. See Lewis  
 20 Declaration at ¶¶ 11 and 14.

21       Markedly, Plaintiff's opposition does not address nor challenge Mr. Ward's capacity  
 22 to bind Plaintiff or to make representations on its behalf. Moreover, Plaintiff makes no  
 23 attempt to dispute the representations made by Mr. Ward to Defendants, but rather  
 24 cryptically references Mr. Ward as a "then employee of Ford Credit." In sum, Plaintiff in  
 25 no way attempts to dispute the representations made by Mr. Ward to Defendant or his  
 26 authority to do so on behalf of Plaintiff.

27       Accordingly, "good cause" exists for the Court to set aside the Clerk's entries of  
 28 default in this case for, as demonstrated herein, Defendants are not culpable for the

1 entries of default, Defendants have a meritorious defense to the underlying action, and  
 2 Plaintiff will not be prejudiced by the setting aside of the defaults.

3 **II. LEGAL ARGUMENT**

4 Plaintiff concedes that the Court may set aside the defaults entered against  
 5 Defendants if it makes any one of the following three findings: (1) that the conduct of  
 6 Defendants did not prompt the default; (2) that Defendants have a meritorious defense in  
 7 the underlying action; or (3) that Plaintiff will not be prejudiced by the setting aside of the  
 8 defaults. See Franchise Holding II, LLC v. Huntington Restaurant Group, Inc., 375 F.3d  
 9 922, 925-26 (9th Cir. 2004); see also Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir.  
 10 1988). In support of its opposition to Defendants' application, Plaintiff attempts to  
 11 analogize the facts of the instant case to the facts underlying Franchise Holding II, LLC.  
 12 However, as detailed below, the facts of this case are distinguishable from those of  
 13 Franchise Holding II, LLC. Moreover, Plaintiff does not contend, argue, or even suggest  
 14 that it will be prejudiced by the Court's setting aside of the defaults in the instant case.

15 **A. Defendants are not culpable for their failure to answer the complaint.**

16 Plaintiff faults Defendants for failing to answer the complaint given their actual notice  
 17 of the filing of the underlying action. Plaintiff further contends that as in Franchise Holding  
 18 II, LLC, Defendants are culpable for failing to take action despite their reliance on ongoing  
 19 negotiations with a third party to purchase the dealership operated by Defendants.

20 However, the facts in the instant case are far different than the facts underlying  
 21 Franchise Holding II, LLC. For instance, in Franchise Holding II, LLC, the defendant,  
 22 Huntington Restaurant Group, Inc. ("HRG"), was "explicitly warned" by Franchise Holding  
 23 that it was proceeding with litigation. See Franchise Holding II, LLC, *supra*, 375 F.3d at  
 24 926. In contrast, no such warning was provided in the instant case until well after the  
 25 entries of default had been taken against Defendants. Instead, Plaintiff's agent, Phil  
 26 Ward, represented to Defendants that it would stand-down or take no further legal action  
 27 with respect to the complaint or the order for writ of possession during the pendency of the  
 28 buy-sell negotiations between Defendants and Plaintiff's parent company. See Lewis

1 Declaration at ¶ 9. Based on Plaintiff's representation that it would not pursue litigation for  
 2 the duration of the buy-sell negotiations, Defendants neither responded to the complaint  
 3 nor opposed Plaintiff's ex parte request for a writ of possession. Nevertheless, Plaintiff  
 4 secured the entries of default against Defendants *prior* to the breakdown in negotiations  
 5 between Defendants and Ford Motor Company. See Lewis Declaration at ¶¶ 10, 12.  
 6 Moreover, Defendants' understanding that Plaintiff would not be proceeding with the  
 7 litigation (i.e., that Plaintiff would take no action to enforce any order or judgment during  
 8 the pendency of buy-sell negotiations) was not disputed by Plaintiff until August 9, 2007,  
 9 (or eight (8) days following the entries of default) via correspondence from Plaintiff's  
 10 counsel, Donald H. Cram in response to a letter from Plaintiff's counsel's which sought to  
 11 memorialize the representations of Mr. Ward. See Exhibits A and B to the Declaration of  
 12 David J. Stock. Thus, Defendants are not culpable for the entries of default for  
 13 Defendants were never advised by Plaintiff that the latter had perceived a breakdown in  
 14 negotiations and would therefore be enforcing its legal rights.

15       **B. Defendants' failure to respond to the complaint was the result of  
 16 excusable neglect.**

17       Excusable neglect is "an equitable concept that takes account of factors such as  
 18 prejudice, the length of the delay, and impact on judicial proceedings, the reason for the  
 19 delay, including whether it was within the reasonable control of the movant, and whether  
 20 the movant acted in good faith." Franchise Holding II, LLC, *supra*, 375 F.3d at 927  
 21 (internal citations omitted). Plaintiff maintains that no separate inquiry as to excusable  
 22 neglect is necessary in the instant case because the court in Franchise Holding, III, LLC  
 23 "ruled that the 'culpability' requirement of Rule 55(c) is the same as the 'excusable  
 24 neglect' requirement under Rule 60(b). However, that court merely noted that the concept  
 25 of excusable neglect "*largely overlaps*" with the issue of culpability. *Id.* at 927 (emphasis  
 26 added). In Franchise Holding II, LLC, the court did not make a separate inquiry as to the  
 27 issue of "excusable neglect," because the plaintiff had "explicitly warned" the defendant  
 28 that it was proceeding with litigation. *Id.* at 926.

1       Here, however, Plaintiff represented to Defendants that it would not be proceeding  
2 with litigation during the pendency of Defendants' buy-sell negotiations with Plaintiff's  
3 parent company, but nonetheless secured the entries of default during said negotiations.  
4 In short, Defendants failure to answer or otherwise respond to the complaint resulted from  
5 the representations of Plaintiff. Consequently, the Court may set aside the entries of  
6 default in this case on the grounds of "excusable neglect" for Defendants' explanation for  
7 the default is "inconsistent with a "devious, deliberate, willful, or bad faith failure to  
8 respond." See Employee Painters' Trust v. Ethan Enterprises, Inc., 480 F.3d 993, 1000  
9 (9th Cir. 2007).

10       **C. Defendants have a meritorious defense to the underlying suit.**

11       Plaintiff maintains: (1) that Defendants have essentially conceded the question of  
12 liability, and have no meritorious defense; (2) that Defendants made a strategic error in  
13 choosing to rely on the proposed sale of the business to satisfy the demands of the  
14 lawsuit; and (3) that Defendants are not saved by the inclusion of a proposed answer.

15       As distinguished from Franchise Holding II, LLC, Defendants have not conceded  
16 liability in the instant action. See Defendants' proposed answer to the complaint attached  
17 as Exhibit A to the Lewis Declaration. Rather, Defendants maintain that any outstanding  
18 obligations owed to Plaintiff have been resolved by virtue of Defendants' voluntary  
19 termination/resignation of the dealership. See Lewis Declaration at ¶ 12. Furthermore,  
20 Plaintiff rather disingenuously suggests that Defendants made a procedural error in relying  
21 on the proposed sale of the business. However, as detailed in the Lewis Declaration,  
22 Defendants did not respond to the complaint or oppose the writ of possession in reliance  
23 on the representations of Plaintiff's agent, Phil Ward, who indicated that Plaintiff would  
24 stand-down or refrain from litigating the underlying action for the duration of the buy-sell  
25 negotiations between Defendants and Plaintiff's parent company. These specific facts are  
26 delineated in the Lewis Declaration, and support the setting aside of the defaults in this  
27 action.

28       ///

D. No prejudice will inure to Plaintiff as a result of the setting aside of the defaults.

3 Plaintiff does not argue that it will be prejudiced if the Court sets aside the entries of  
4 default against Defendants. As noted in Defendants' application, Plaintiff will sustain no  
5 prejudice by the setting aside of the defaults in this matter for Defendants did not delay in  
6 bringing forth this application which was filed on September 7, 2007, or approximately one  
7 (1) month following the Clerk's August 1, 2007 entries of default against Defendants.  
8 Moreover, the assets/inventory of the dealership have been surrendered to Plaintiff's  
9 parent company by virtue of Defendants' termination/resignation of the franchise (the  
10 dealership) to Ford Motor Company. Pursuant to said arrangement, Ford Motor Company  
11 will provide the inventory or payments therefor to Plaintiff. See Lewis Declaration at ¶ 12.  
12 Because the Court may set aside the defaults in the instant case if it finds that Plaintiff will  
13 not be prejudiced, Defendants respectfully request that the Court grant their application.

### III. CONCLUSION

15 The liberal construction of excusable neglect warrants the Court's setting aside of the  
16 defaults in this action for Defendants need only establish one of the following factors: (1)  
17 that the conduct of Defendants did not prompt the entries of default; (2) that Defendants  
18 have a meritorious defense in this action; or (3) that Plaintiff will not be prejudiced by the  
19 setting aside of the defaults. Defendants have demonstrated each of the foregoing  
20 factors, and Plaintiff has effectively conceded that it will not be prejudiced if the defaults  
21 are set aside. Therefore, Defendants respectfully request that the Court set aside the

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1 entries of default in this action and permit Defendants to file an answer to complaint.

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4 Dated: October 16, 2007

Respectfully submitted,

RANKIN, LANDSNESS, LAHDE,  
SERVERIAN & STOCK

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By:

  
David J. Stock, Attorneys for  
for Defendants LEWIS FAMILY  
ENTERPRISES, INC. and  
STEVEN ROBERT LEWIS

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